Supreme Court, U. S.
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80-569
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

ALTON J. BAILEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. PAUL BARKER
BARKER, BOUDREAUX, LAMY,
GARDNER and FOLEY
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112

GEORGE KAUFMANN
(Counsel of record)
2101 L Street, N.W.
10th Floor
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Petitioners are two local unions, one black and the other almost entirely white, although individuals were free to join either local. The unions are and have been of almost equal size. Respondent is a member of the black local who challenged a work distribution practice which allocates jobs equally among the two locals, claiming that it has a discriminatory impact on employment opportunities for blacks in violation of Title VII of the Civil Rights Act of 1964. Class certification was denied because nearly 90% of the members of the black local—the putative class members—petitioned the district court in opposition to the relief plaintiff sought: merger of the two locals. They opposed it because they would thereby lose "our right to equal jobs with whites" and their autonomy to protect the interests of black employees. Both courts below found that over a period of many years neither plaintiff nor any other black employee had suffered any adverse employment consequences from the challenged work distribution practice. The court of appeals, however, found a perceived possibility that if the relative size of the locals changed at some time in the future the practice could have an adverse impact on blacks and thereby violate § 703(c)(2) of Title VII. Solely on that basis, the Court of Appeals directed not that the practice be modified but that the two locals be merged—the very relief 90% of the would-be class had objected to in successfully opposing class certification. Accordingly, the question presented is:

> Is not the order of the Court of Appeals directing merger of the two locals wholly inconsistent with Title VII, the basic principles of equity established by this Court, and the proper allocation of functions between the district courts and the courts of appeals in formulating equitable decrees?

LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to the proceeding below:

Ryan Stevedoring Co., Inc.
Rogers Terminal and Shipping Corp.
Louisiana Stevedores, Inc.
Ramsay, Scarlett & Co., Inc.
Baton Rouge Marine Contractors, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Local 1830 and Local 1833, General Longshore Workers, International Longshoremen's Association, AFL-CIO, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 14, 1980.

OPINIONS BELOW

The original opinion of the district court is reported at 7 FEP Cases 914 (M.D. La. 1974) and is reprinted herein as App. E (28a-40a). The first opinion of the court of appeals is reported at 528 F.2d 551 (5th Cir.

1976) and is reprinted herein as App. C (12a-24a). The order denying rehearing of that decision (Judge Clark dissenting) is reported at 533 F.2d 976 (5th Cir. 1976) and is reprinted herein as App. D (25a-27a). The district court decision upon remand is reported at 443 F.Supp. 899 (M.D. La. 1978) and is reprinted herein as App. B (5a-11a). The second court of appeals decision—the decision from which certiorari is sought—is reported at 613 F.2d 588 (5th Cir. 1980) and is reprinted as App. A (1a-4a).

JURISDICTION

The court below entered judgment on March 14, 1980, App. F (41a-42a). A timely petition for rehearing was denied on May 12, 1980, App. G (43a-44a). On August 5, 1980, Mr. Justice Powell extended the time for filing this petition to and including October 9, 1980, App. H (45a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction over this action under § 706(f)(3), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(f)(3), and 28 U.S.C. § 1343(4).

STATUTORY PROVISIONS INVOLVED

Section 703(c)(2), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-2(c)(2), provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> * * * *
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely

> affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin . . . .

Section 706(g), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-5(g), provides in pertinent part as follows:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) of this title.

STATEMENT OF THE CASE

Petitioners are Local 1830 and Local 1833 of the General Longshore Workers, International Longshoremen's Association, AFL-CIO. Local 1830 was organized in 1955 and has historically been, and was at the time of this lawsuit, comprised only of black members. Local 1833 was organized in 1956 and has historically been, and

was at the time of this lawsuit, comprised almost entirely of white members.[1] Since their inception, these two locals have bargained jointly—each local being equally represented in the bargaining process—with the Baton Rouge Steamship Association, which is comprised of the stevedoring companies that operate in the Port of Baton Rouge. The result of these joint negotiations is a single collective bargaining agreement covering both locals.

Members of both locals receive their work assignments at a single hiring area. Work assignments are made twice daily at "shape-ups", where foremen select workers for various longshore gangs. Each such gang is comprised of a variety of longshore jobs; all of the jobs pay the identical rate. Selection for a work assignment is not based upon seniority, but must be made in a manner consistent with certain guidelines set out in the bargaining agreement: preference is conferred upon those who were present and registered at the preceding shape-up but who were not then selected for any work assignment; and, overall hiring at each shape-up is to be done in such a fashion as to assure to the extent practicable that the members of each local have equal access to work opportunities. In the latter regard, the collective bargaining agreement provides as follows:

> The employer, while having the right to select his employees, agrees to cooperate with union representatives in effecting an equitable distribution of work among the available work force. A central hiring system will be established wherein work records of

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[1] This case does not concern the reasons for the racial composition of the two locals. There is no evidence, and the courts below did not find, that blacks were excluded from membership in Local 1833, or whites from Local 1830. The only evidence in the record on this point is the statement of nearly 90% of the members of Local 1830 that they understood they were free to join Local 1833 if they so wished. See *infra* at 7.

each employee will be maintained in order to assist the parties in distributing the available work.[2]

At all times since at least since 1965, Local 1830 has had approximately the same number of members as local 1833. App. 34a. The district court found (App. 34a-35a, paragraph numbers omitted):

> There is no dispute about the fact that work has been assigned on close to a 50-50 basis between the two locals, but that over the years, the black longshoremen have been assigned more working hours than have the white members of Local 1833. From the inception of these locals in 1956 through the year 1973, the black members of Local 1830 have been assigned 54 per cent of all of the longshoremen's work at the docks.
>
> During the whole seventeen years from 1956 to 1973, there have been only two years (1971-1972) that blacks have not worked more hours than whites.
>
> After a union member has worked 700 hours or more in a year, he is entitled to vacation pay, holiday pay, and welfare benefits. In every year since 1956 more blacks than whites have been assigned over 700 hours of work per year.

Respondent, Alton J. Bailey, is a black longshoreman and a member of Local 1830. Bailey brought suit in the United States District Court for the Middle District of Louisiana against petitioners (the two locals) and certain of the stevedoring companies which make up the employer associations, alleging, *inter alia*, that the so-called "50%-50% rule" violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[3] As relief, Bailey

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[2] Defendants' Exhibit E-5, Article 1, Section F, page 4.

[3] Bailey's complaint did not actually allege the existence of a "50%-50% *rule*." Rather, it alleged that the defendants "allocate approximately" 50% of the available jobs to the members of each local. The complaint further alleged that Local 1830 has approximately twice as many members as Local 1833, and therefore that

sought, *inter alia*, an order directing the merger of the two locals.

In addition to his individual action, Bailey sought to represent a class of "other persons similarly situated." At the time the lawsuit was initiated Local 1830 had approximately 230 members. A petition of 204 of these members in opposition to certification of a class was presented to the district court. In pertinent part, the petition stated as follows (App. 13a-14a, emphasis added):

> We understand . . . Bailey claim[s] to represent all black persons employed as longshoremen on the Port Allen docks since 1965 and all black persons who are members of Local 1830.
>
> We understand [he is] seeking to join our black Local 1830 and the white Local together.
>
> We state . . . Bailey [does] not represent us as a class in [his] effort to integrate the unions. *If the unions are integrated, we will lose (1) our right to equal jobs with the whites, (2) our right to elect our own officers and grievance committees, and (3) our rights to our own meetings and a chance to hold office and act for the black longshoremen to protect their interest.*
>
> By maintaining our separate strength and not having it diluted by joining with the white Local we have been able to obtain the same wages, the same number of jobs and equal working conditions, including foremen and other jobs in the Port. . . . .

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members of the latter local have "twice as great an opportunity to secure employment." There is no evidence in the record of any hard and fast "50%-50% rule." To the contrary, the collective bargaining agreement, quoted in text, *supra*, calls only for "equitable distribution of work." And the district court did not find there to be such a "50%-50% rule." Rather, the district court found that in practice, the memberships of the two locals having been virtually equal for years (contrary to Bailey's allegation), jobs were allocated on "close to a 50-50 basis." App. 34a.

> *We do not want . . . Bailey to act for us as a class in this suit and we do not want our Local Union destroyed. We understand that if any of us want to we have the right to join the white union or stay a member of the black union now.*

Based largely on this petition, the district court refused to certify the case as a class action App. 33a, 38a-39a. On the merits, the district court, after a trial, found, *inter alia*, as follows (App. 33a-34a, 35a, paragraph numbers omitted):

> There is not one bit of evidence in this record to support plaintiff's claim that the defendants [i.e. the locals and the stevedoring companies] have discriminated against the plaintiff or any other black longshoreman with regard to compensation, terms, conditions or privileges of employment, ...
>
> * * * *
>
> There is no credible evidence to support the contention that the defendants have in any way discriminated against blacks in either the volume or the nature of the work assigned to longshoremen at the Port of Baton Rouge.

Finding that Bailey had not suffered from any discrimination at the hands of the defendants, the district court entered judgment in favor of defendants, dismissing Bailey's suit in its entirety.

On appeal, the Fifth Circuit affirmed the district court's refusal to treat the case as a class action, stating that "[i]t appears . . . that the views of a majority of the black longshoremen are antagonistic with those of the appellant, the would-be standard bearer for the proposed class." App. 14a. On the merits, the court of appeals sustained the district court's findings that Bailey had not personally suffered from any racial discrimination by the defendants and that there had been no discrimination "against blacks in either the volume or the nature of work assigned to longshoremen at the Port of

Baton Rouge." App. 18a. The Fifth Circuit stated flatly that Bailey "did not prove that the 50%-50% rule *actually* deprived blacks of employment opportunities." App. 18a, n.8.

Nevertheless, the court of appeals reversed, finding that the "50%-50% practice" violates § 703(c)(2) of Title VII, 42 U.S.C. § 2000e-2(c)(2). The court explained the nature of this violation as follows (App. 23a, emphasis added): "Because of the inevitable fluctuation in union membership, there is a real *possibility* for discriminatory treatment." See also App. 17a, n.6 (emphasis in original): "* * * Although the *reality* of discriminatory treatment was not proven in this case, the *threat or potential* is obvious and is violative of 42 U.S.C. § 2000e-2(c)(2)."

On the basis of this "potential" effect of the "50%-50% rule," the Fifth Circuit directed the very relief that had been opposed by the overwhelming majority of black longshoremen—which opposition had caused denial of class action status: merger of Locals 1830 and 1833.[4] Thus, the court stated (App. 24a):

> We conclude that the district court erred when it refused to grant appellant's motion for permanent injunction against the continued operation of segregated locals. The 50%-50% hiring practice represents a threat of employment discrimination and thus violates 42 U.S.C. § 2000e-2(c)(2), which makes an employment practice unlawful if it "would deprive or tend to deprive" an individual of employment opportunities.

Thereafter, petitioners unsuccessfully sought rehearing or rehearing *en banc* in the Fifth Circuit, Judge Clark dissenting from the denial of the latter. App. 25a. This Court denied their petition for a writ of certiorari. 429 U.S. 1052.

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[4] The Fifth Circuit determined that Bailey was not entitled to recover any backpay because he had suffered no injury.

On remand, however, the district court ruled that this Court's intervening decision in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), compelled it to deviate from the mandate of the court of appeals. The district court stated (App. 11a):

> In the present case, it was determined by both this Court and the Court of Appeals that the plaintiff had suffered no racial discrimination at the hands of any of the defendants, and it was likewise determined by both Courts that no member of the alleged class had been discriminated against by these defendants. Both Courts concluded that the plaintiff was not the representative of a class, and thus, as in the *East Texas Motor Freight* case, he is hardly "in a position to mount a class-wide attack on . . ." the defendants in this case.
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> * * * *
>
> [I]n light of the most recent case law from the Supreme Court, it would be illegal and unjust to compel the merger of the two unions under the circumstances of this case.

Accordingly, the district court again dismissed Bailey's suit, App. 11a. On appeal, the Fifth Circuit reversed, holding that *Rodriguez* required no change in its earlier decision (App. 3a):

> In this Court's prior opinion, it was found that the continuous fluctuation in the membership of each segregated local union and the 50%-50% hiring rule represented a real threat of discriminatory treatment. 528 F.2d at 554 n. 6, 557. Since plaintiff Bailey presently suffers from this threat of discriminatory treatment, he has the requisite standing to assert a violation of his statutory rights under Title VII. Thus, *East Texas Motor Freight System, Inc.* v. *Rodriguez* is inapplicable and plaintiff Bailey was and is entitled to a permanent injunction merging the two segregated local unions into one integrated local union.

REASONS FOR GRANTING THE WRIT

Plaintiff Bailey was denied the status of class representative because nearly 90% of the class he claimed to represent—204 out of approximately 230 black members of Local 1833—opposed the relief he sought, a merger of Locals 1830 and 1833. In explaining their opposition in a "voluntary petition" (App. 13a) filed with the District Court they stated, in part: "If the unions are integrated, we will lose . . . our right to equal jobs with the whites," and they explained that by "maintaining our separate strength, . . . we have been able to obtain the same wages, the same number of jobs and equal working conditions, including foremen and other jobs in the Port", whereas if the unions were merged, "a few dissatisfied black men can join with the white men and deprive the vast majority of black workers of their jobs and working conditions." (P. 6, *supra*).

Nevertheless, the court below commanded that "our Local Union [be] destroyed" (p. 7, *supra*)—the precise result which they sought to avoid. The court did so not because it determined that the existence of the separate locals was *per se* illegal—an issue which was expressly reserved (App. 24a), and which would raise entirely different substantive and remedial issues than are presented by this Petition.[5] Rather, it did so in order to remedy what it determined to be a violation of § 703 (c) (2) of the 1964 Civil Rights Act in that "the longshoremen were hired according to [a] 50%-50% rule", that is, an allocation of jobs between the locals on a 50/50 basis. According to the court below, "Because of the inevitable fluctuation in union membership, there is a real possibility for discriminatory treatment." (App. 24a;

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[5] It bears emphasis in this connection that the petitioning black members of Local 1833 understood "that if any of us want to we have the right to join the white union or stay a member of the black union now." See 7, *supra*.

see also p. 8, *supra*, quoting App. 23a and 17a, n.6). The Court of Appeals took this drastic step although it approved the finding of the District Court that as a matter of eight years' actual experience the black members of Local 1830 had enjoyed equal employment opportunity (pp. 7-8, *supra*), and although it merely perceived, but had no evidence, that future fluctuation in the relative size of the two locals was "inevitable". And, the Court of Appeals took this step although there were means of relief available which would fully protect against the "threat" the court perceived without requiring the merger that 90% of the affected black employees opposed. See pp. 14-15, *infra*.

In thus overriding the thoughtfully expressed desires of the vast majority of the black members affected (as well as those of the white members of Local 1833, the other petitioner here), the court below may well have unwittingly deefated, rather than promoted, the principal objective of Title VII. How matters will turn out if the decision below stands, only the future can tell. But it can be stated with assurance now that review should be granted because the decision below conflicts with the decisions of this Court in at least two critical respects:

1) The court disregarded the "basic principles of equity" (*Teamsters* v. *United States*, 431 U.S. 324, 374) which, under this Court's precedents, circumscribe the power of a court in fashioning an equitable decree under federal statutes, including Title VII of the 1964 Civil Rights Act.

2) The Court failed to heed what this Court has determined to be the proper "division of functions between the federal trial courts and the federal appellate courts" in the formulation of equitable decrees, although observance of the courts' proper roles "is important in every

case", see *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 410.[6]

1(a). The duty of the courts in formulating equitable relief for violations of federal statutes is well established: As Mr. Justice Harlan wrote in *Mills* v. *Electric Auto-Lite, Inc.*, 396 U.S. 375 at 386:

> In selecting a remedy the lower courts should exercise " 'the sound discretion which guides the determinations of courts of equity,' " keeping in mind the role of equity as "the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Hecht Co. v. Bowles, 321 U.S. 321, 329-330, (1944), quoting from Meredith v. Winter Haven, 320 U.S. 228, 235 (1943).

This fundamental principle has governed the exercise of the Court's equitable powers in remedying violations of

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[6] We disagree with the Court of Appeals' determination that defendants have violated § 703(c)(2). The correctness of that ruling, which is necessary, but by no means sufficient to sustain its judgment, is encompassed within the Question Presented by this Petition. However, because the petitioners' overriding concern is with the preservation of their local unions, and because the Court of Appeals' departure from precedent in formulating the decree so plainly justifies review by this Court, we have not put forward the Court's interpretation of § 703(c)(2) as an independent reason for granting the Writ. This is not to suggest that the Court's interpretation of § 703(c)(2) does not raise an important issue: In that Court's view a practice may "tend to deprive any individual of employment opportunities," despite a lengthy operation of the practice without any adverse employment effects on the plaintiff or any other protected individual, solely on the basis of the Court's unsupported speculation as to what may happen in the future. We are unaware of any other case under § 703(c)(2), or its counterpart § 703(a)(2), which reads this statutory phrase so broadly. Indeed, if the Court of Appeals' reading of that provision in this case were correct, there are few if any forms of classification of employees which would be lawful.

Title VII of the 1964 Civil Rights Act. In *Teamsters* v. *United States*, 431 U.S. 324, 374-375, this Court held:

> [T]he extent to which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practically [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330. Cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S., at 195-196, modifying 113 F.2d 202 (CA 2); 19 N.L.R.B. 547, 600; *Franks*, [v. *Bowden Transportation Co.*] 424 U.S., [747] at 798-799 (Powell, J., concurring in part and dissenting in part). Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable." *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-201 (opinion of Burger, C.J.).

These limitations on the exercise of equitable discretion in formulating remedies under Title VII have also been recognized in *Albemarle Paper Co.* v. *Moody*, (hereafter "*Albemarle*"), 422 U.S. 405, 415-16; *Franks* v. *Bowman Transportation Co.*, (hereafter "*Franks*"), 424 U.S. 747, 777-78, text and note at n.39; and *Los Angeles Dept. of Water & Power* v. *Manhart*, (hereafter "*Manhart*"), 435 U.S. 702, 719.

This Court has not only enunciated these precepts; it has implemented them. In *Teamsters*, the Court determined that an "equitable balance * * * should be struck between the statutory rights of victims and the contrac-

tual rights of nonvictim employees." (431 U.S. at 376). And while *Albemarle* emphatically declared that the policies of Title VII ordinarily require that the victims of discrimination who have suffered economic injury be made whole by an award of backpay, it left open the possibility that such relief would be denied in that very case if the defendant could show prejudice by the plaintiffs' initial disclaimer of such relief. (See *id.* at 423-425). In *Manhunt* this Court "[w]ithout qualifying the force of the *Albemarle* presumption in favor of retroactive relief . . . conclude[d] that it was error to grant such relief in this case." (435 U.S. at 723). The Court held that "the presumption" was overcome by the serious adverse impact which such liability would have on pension funds. (See *id.* at 719-723.)

(b) In sharp contrast to this Court's precepts and practice, the Court of Appeals directed a merger of the two locals without regard to the countervailing equitable considerations which were so forcefully called to its attention by the 204 black members' "voluntary petition" (App. 13a). Even as a matter of elementary logic the violation of § 703(c)(2) which the Court of Appeals found could be remedied by an order other than the merger of the locals. That violation was said to consist of "the 50%-50% hiring practice" which created the "*potential*" or "*threat*" of future discrimination. See p. 8, *supra*. Since that practice consisted of the conjunction of separate black and white locals *and* the existence of a 50%-50% "rule" allocating jobs between those locals, that "threat" could be removed, and the violation remedied, by *either* the merger of the locals *or* eliminating the 50%-50% "rule". Yet for aught that appears from its opinion the Court of Appeals did not even consider the latter alternative, which could have been given practical effect in a decree which the District Court should have been directed to formulate on remand once the Court of Appeals had determined that there was a violation. The

Court of Appeals did not find that any relief other than merger would be futile, nor could it have done so; indeed, the collective bargaining agreement between the parties provided for just the contingency contemplated by that court; it contains a clause to allow the employers the flexibility to compensate for any substantial fluctuation in the relative membership of the locals (see pp. 4-5, *supra*).[7]

The Court of Appeals' disregard of this Court's teachings is particularly unjustifiable—and the need for review by this Court all the greater—for two reasons. *First*, unlike the situation in *Albemarle*, *Franks*, *Teamsters* and *Manhart*, the court below had before it no victims of past discrimination whose interest in obtaining full relief was entitled to strong consideration in formulating a remedy. Thus, the element which weighed heavily in favor of broad relief there is entirely absent here.

Second, the Court of Appeals' decision requires these 200-odd innocent employees (as well as the white members of Local 1830) to sacrifice additional valued rights which have statutory and, we submit, even constitutional basis. The decision below directly overrides these employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" vouchsafed by § 7 of the National Labor Relations Act, 29 U.S.C., § 157. As stated in *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33: "That is a fundamental right." It is at the very core of the rights granted by the NLRA and to say the least is not to be overridden in the absence of a clear showing that the objectives of Title VII cannot be effec-

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[7] For example, the hiring formula could have been changed from "50%-50%" to a ratio dependent upon the relative sizes of the two memberships at any given time. Even this assumes that the Court could appropriately direct relief which extended beyond the individual plaintiff Bailey; but see pp. 16-17, n. 9, *infra*.

tuated by some other means. Cf. *California Brewers Assn.* v. *Bryant*, 444 U.S. 598, 609.[8] Particularly instructive in this connection is the *Manhart* decision, where the Court in denying retroactive backpay took heed that in enacting ERISA, "Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans." (435 U.S. at 721, n. 40.)

The black members' interest in forming and preserving their own union to further their economic and other interests is, as this Court repeatedly held, also protected by the First Amendment. See *e.g. Thomas* v. *Collins*, 323 U.S. 516; *Trainmen* v. *Virginia*, 377 U.S. 1; *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217; *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463. And while we by no means contend that Congress could not outlaw racially separate locals if necessary to promote equal employment opportunity, that is not this case. And, as *U.S.* v. *Robel*, 389 U.S. 258, 268, teaches, even when legislative concerns regarding national security "are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." Yet the Court of Appeals, though admonished, as a court of equity, to formulate a decree which will provide a "nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims" (see p. 13, *supra*) has in this case chosen to implement § 703(c)(2) by the *most* drastic means.[9]

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[8] As to the black members' right to elect their own officers, hold their own meetings, and to hold office, see also generally the Labor Management Report and Disclosure Act of 1959, 29 U.S.C., § 401 *et seq.* and particularly Title IV thereof.

[9] The Court of Appeals' decree is overbroad in a further, significant respect, in that it unnecessarily goes far beyond protecting the employment opportunities of the individual plaintiff Bailey. While the Court correctly ruled that Bailey as a member of Local

1830 had standing to challenge the "50%-50% hiring practice", the scope of its decree is inconsistent with the spirit if not the letter of *East Texas Motor Freight Co.* v. *Rodriguez*, 431 U.S. 395. For what would be the point of insisting on "careful attention to" the requirements of Rule 23(a) of the F.R. Civ. P. (*id.* at 405) if the courts were free to enter an order which adversely affects the very persons whom the plaintiff is disqualified from representing because they oppose the relief which he seeks? The Fourth Circuit, in *Nance* v. *Union Carbide Corp., Consumer Prods. Div.*, 540 F.2d 718, 722-723 (4 Cir.), recognized that classwide relief, where it is not necessary to remedy the plaintiff's individual claim, is inappropriate in Title VII actions where the requirements of Rule 23 are not met. And the Ninth Circuit has expressly left open the question whether a plaintiff in an action under Title VII might obtain relief benefitting nonparties and broader than that necessary to protect his own individual interests (see *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9 Cir. 1974). But other lower courts have swept away those requirements and imposed unnecessarily broad injunctions with classwide impact despite noncompliance with Rule 23. As the Tenth Circuit rationalized, in *Barela* v. *United Nuclear Corporation*, 462 F.2d 149, 154 (10th Cir.):

> . . . Rule 23 is not the best possible vehicle for the kind of relief which we now consider; its technical prerequisites are therefore often used as a shield whereby its efficacy as a sword is undermined. Many of the cases have suggested that the individual plaintiff seeking an injunction against a pervasive practice assumes the role of a private attorney general attempting to carry out the objectives of an act which is strongly affected by a public interest.
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> A vast number of cases in addition to those cited above . . . emphasize that in the civil rights injunction case the court has the authority, Rule 23 notwithstanding, to fashion an injunctive remedy designed to uproot the policy or practice for the protection of the other employees.

See also, e.g., *Peltier* v. *City of Fargo*, 533 F.2d 374, 379-380 (8th Cir.); *Tipler* v. *E. I. du Pont de Nemours & Co.*, 443 F.2d 125, 130 (6th Cir.), *Taylor* v. *Jones*, —— F.Supp. ——, 23 FEP Cases 1274, 1279-1282 (E.D. Ark.); *William* v. *Boorstin*, 451 F.Supp. 1117, 1126-1127 (D. D.C.), reversed on other grounds, —— F.2d —— (D.C. Cir. Oct. 3, 1980); *Saracini* v. *Missouri Pacific Railroad Co.*, 431 F.Supp. 389, 395-396 (W.D. Ark.).

2. The Courts of Appeals' disregard of fundamental equitable principles established by this Court would alone fully justify review of its decision. But review is appropriate for the additional reason that that court contravened the precedents of this Court by itself directing a merger of the local unions without first remanding the case to enable the District Court to formulate the appropriate remedy for the violation of § 703(c)(2) which the Court of Appeals had found.

As this Court said in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 409: "While we would by no means discount the importance of [the substantive] aspect of the case, we think that the case is every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system". See also *id.* at 410. That allocation of functions imposes upon the district courts, rather than the courts of appeals, the initial duty to formulate the appropriate equitable remedy for a violation of law, including violations of Title VII. The statutory "scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts." *Albemarle Co.*, *supra*, (422 U.S. at 416), quoted with approval in *Franks*, *supra*, 424 U.S. at 779. And in *Teamsters*, *supra*, where, as we have seen, this Court held that an "equitable balance . . . should be struck between the statutory rights of victims and the contractual rights of nonvictim employees", it was held also that that "determination is best left, in the first instance, to the sound equitable discretion of the trial court." (431 U.S. at 376), following *Franks* and *Albemarle*. See also *Dayton*, *supra*, 433 U.S. at 420.[10]

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[10] As *Albemarle* also made clear, the District Court's exercise of its equitable discretion is subject to appellate review under the

The Court of Appeals was even more needful of the trial court's "keener appreciation of those facts and circumstances peculiar to particular cases" [11] here than in the more familiar situations where the violation consists of proven past discrimination or other deprivation of right which calls for a "make-whole" remedy. In such cases, the record on which a court of appeals bases its determination that there has been a violation may be sufficient to enable it to prescribe the appropriate remedy without further consideration by the district court.[12] But where, as here, there is no such history, and the sole basis for providing injunctive relief is a determination that there is an illegal "threat" of future adverse effects upon black employees, a court is wholly unwarranted in assuming that there is but one way in which that potential can be avoided and the violation remedied.[13]

"familiar" [standard] of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case. (422 U.S. at 424; see also *id.* at 416).

[11] *Albemarle*, 422 U.S. at 421-422, more fully quoted in the succeeding footnote. See also, *e.g.*, *Mayor* v. *Educational Equality League*, 415 U.S. 605, 621, reaffirming "the salutary principle that great weight should be acocrded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances."

[12] As the Court said *Albemarle:* "The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keeper appreciation of those facts and circumstances peculiar to particular cases." (422 U.S. at 421-422). As we have seen, the *Albemarle* case was remanded to the district court for determining whether there was an equitable ground, not offensive to Title VII, for denying backpay.

[13] Here, the complicated hiring process on the Baton Rouge docks, as well as the organizational problems inherent in the merger of two local unions were additional matters bearing on the alterna-

Thus, once the Court of Appeals had determined that there was a violation of § 703(c)(2), a proper regard for its own institutional limitations should have caused that court to remand the case to the District Court for the formulation of a remedy even if the opposition of the black members had not made clear that countervailing equities required careful consideration before a merger of the unions was directed.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

C. PAUL BARKER
BARKER, BOUDREAUX, LAMY, GARDNER and FOLEY
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112

GEORGE KAUFMANN
(Counsel of record)
2101 L Street, N.W.
10th Floor
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioners

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tives to merger and the potential disadvantages thereof which would have provided additional guidance as to what relief would be equitable. Cf. *Teamsters, supra*, 431 U.S. at 376, n.62:

> Other factors, such as the number of victims, the number of nonvictim employees affected and the alternative available to them, and the economic circumstances of the industry may also be relevant in the exercise of the District Court's discretion.